

**DEPARTMENT OF CRIMINAL JUSTICE TRAINING  
2019A LEGAL REVIEW  
CASE LAW SUMMARIES**

**UNITED STATES SUPREME COURT**

**District of Columbia v. Wesby, 138 S.Ct. 577 (2018).**

**FACTS:** On March 16, 2008, members of the District of Columbia Metropolitan PD responded to a complaint of loud music and illegal activities at a vacant home. One of those calling was a respected neighborhood representative. Upon arrival, neighbors confirmed the house was supposed to be empty. When officers knocked, a man looked out a window near the door and dashed upstairs. Another partygoer opened the door, admitting the officers. The officers could observe that the house looked like a vacant property, and they smelled marijuana and saw alcoholic beverages. The house did have electricity and working plumbing, but no furniture in sight beyond a few metal chairs. During the investigation, they discovered there was food in the refrigerator and toiletries in the bathroom.

Among the activities going on downstairs was a “makeshift” strip performance, with scantily-clad women dancing and receiving cash. Upstairs, officers found a mattress on the floor, the only one in the house, and used condom wrappers scattered about. One partygoer was hiding in the closet and another had locked himself in the bathroom. A total of 21 people were in the house. Upon being questioned, those individuals gave neither a clear nor a consistent story of what was going on – but several claimed a woman was “renting the house” and had given them permission to be there. The woman was identified only by a nickname (Peaches) and was not present. They were able to reach her on the phone but she said she’d left to go to the store and would not return as she feared being arrested. She also gave an unclear explanation as to her rights to the house, and hung up. After a second and then third call, she finally admitted she did not have permission to be there.

Officers were able to reach the property owner, who stated that he had not finalized any arrangements with the women and that no one had permission to be there, let alone to be having a party there. All of the individuals were arrested, originally for unlawful entry, but the charges were amended to disorderly conduct. Ultimately, even those the charges were dropped.

16 of the 21 partygoers filed suit, under 42 U.S.C. §1983, claiming false arrest under the Fourth Amendment. The District Court ruled in favor of the 16 partygoers. The D.C. Circuit upheld that decision. The City and the officers petitioned for certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May officers be held liable for making an arrest upon reasonable facts that a crime is being committed, even if it is later determined that arrest was incorrect?

**HOLDING:** Yes

**DISCUSSION:** The Court began, noting that “a warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer’s presence.”<sup>1</sup> To determine probable cause, the Court agreed it must look at the events that led up to the arrest and determine if “viewed from the standpoint of an objectively reasonable police officer,” probable cause was satisfied.

The Court detailed the facts known to the officers. They had been told by several credible neighbors that the house was vacant. The house was essentially bare. The utilities were on but that wasn’t unusual if the house was vacant for only a short time or due to be rented soon. There was nothing inside, such as boxes, to indicate anyone was moving into the house. Looking at the conduct of the partygoers, several of whom fled upon the arrival of the officers, it was reasonable for the officers to make “common-sense conclusions about human behavior.” Homeowners, as a rule, do not “live in near-barren houses,” allow their homes to be used as strip clubs and leave their homes in a filthy condition. As such, it was reasonable to infer that the partygoers knew that their presence there was unauthorized, especially since “many scattered” when the officers arrived. “Unprovoked flight” is, it agreed, a strong indication of wrongdoing.<sup>2</sup> When questioned, the partygoers gave “vague and implausible responses,” as well, with only two claiming they were invited specifically by Peaches, whom they knew only by her nickname, and they were “working the party instead of attending it.” None of the actual partygoers knew the name of the supposed “hostess” and some claimed it was a bachelor party – but no bachelor was identified. When they spoke to Peaches, she was “nervous, agitated and evasive” and ultimately she admitted she had lied about her right to be there.

Viewed as a whole, it was certainly reasonable, the Court decided, for an officer “to conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house.” The lower courts, the Court noted, “engaged in an ‘excessively technical discussion’ of the factors supporting probable cause.” Those courts took the facts in isolation, rather than looking at the totality of the circumstances. Court precedent recognized “that the whole is often greater than the sum of its parts – especially when the parts are viewed in isolation.”<sup>3</sup> Although the facts, each standing alone, could be said to not satisfy probable cause, the requirement to look at the totality “precludes this sort of divide-and-conquer analysis.” Even though most of the actions were “innocent,” the Court noted that officers were not required to accept it in the light of a “substantial chance of criminal activity.”

The Court reversed the D.C. Circuit, and held that the officers did have probable cause to make the arrests. As such, the District and the officers were entitled to summary judgement. Although that was sufficient to resolve the matter, the Court elected to take another step, to specifically address the error “on both the merits of the constitutional claim and the question of

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<sup>1</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>2</sup> *Illinois v. Wardlow*, 528 U.S. 119 (2000).

<sup>3</sup> *U.S. v. Arvizu*, 534 U.S. 266 (2002).

qualified immunity.” The Court elected to do so because the appellate court’s analysis, if followed elsewhere, might undermine similar cases involving qualified immunity.

The Court noted that officers are entitled to qualified immunity unless they violated a federal statutory or constitutional right and the unlawfulness of the actions they took was “clearly established at the time.”<sup>4</sup> That is a high standard and requires that the law on an issue was sufficiently clear that an officer would understand the unlawfulness of their conduct. The underlying legal principle must be “settled law”<sup>5</sup> and such that every reasonable official would know. “The rule’s contours must be so well defined that it is ‘clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’”<sup>6</sup> It must be highly specific, not general.<sup>7</sup> Specificity is “especially important in the Fourth Amendment context.”<sup>8</sup> “Given the imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in ‘the precise situation encountered.’”<sup>9</sup> It is necessary, therefore “to identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.”<sup>10</sup> It requires, in most cases, a “body of relevant case law.”

In this situation, the Court agreed, the circumstances made it reasonable for the officers to make the arrests, as they had probable cause, even if the officers were possibly mistaken. There was certainly no settled law to the contrary. Nothing required the officers to accept without question the assertions of the partygoers, and precedent agreed that “officers are not required to take a suspect’s innocent explanation at face value.” Looking at the “entire legal landscape,” the officers reasonably had probable cause.

The D.C. Circuit was reversed and the case was remanded.

### **Kisela v. Hughes, 138 S.Ct. 1148 (2018).**

**FACTS:** In May, 2010, a neighbor called 911 to report that a “woman was hacking a tree with a kitchen knife.” Officers Kisela and Garcia were dispatched to the scene. The caller flagged them down, gave them a description of the woman and described erratic behavior. Officer Kunz arrived on her bicycle.

Officer Garcia spotted a woman, Chadwick, standing next to a car in a driveway, but a fence with a locked gate separated the officer from the woman. Another woman (Hughes) emerged from the house “carrying a large knife at her side.” Hughes met the description of the erratic subject and walked toward Chadwick, stopping no more than six feet away from her. All three officers drew their pistols and Hughes was ordered to drop the knife. Chadwick said “take it easy” to both Hughes and the three officers. “Hughes appeared calm but she did not acknowledge the officers’ presence or drop the knife. Kisela dropped to the ground to get a better line of sight and shot

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<sup>4</sup> Reichle v. Howards, 566 U.S. --- (2012).

<sup>5</sup> Hunter v. Bryant, 502 U.S. 224 (1991).

<sup>6</sup> Saucier v. Katz, 533 U.S. 194 (2001).

<sup>7</sup> Plumhoff v. Rickard, 572 U.S. --- (2014).

<sup>8</sup> Mullenix v. Luna, 577 U.S. --- (2015).

<sup>9</sup> Ziglar v. Abbasi, 582 U.S. --- (2017).

<sup>10</sup> White v. Pauly, 580 U.S. --- (2017).

Hughes through the fence. The officers went over the fence and secured the injured Hughes. She was transported and treated; she survived. Less than a minute elapsed between the time the officers saw Chadwick and Kisela fired.

Later, all three officers indicated that they “subjectively believed” Hughes was a threat to Chadwick. They learned later that the two were roommates and that Chadwick was upset over a small debt. Shortly before the shooting, Hughes had been threatening Chadwick’s dog with the knife. Chadwick was going to her car to get the money for the debt when the police arrived. Chadwick swore in an affidavit that she did not feel endangered.

Hughes filed suit against Kisela under 42 U.S.C. §1983, claiming excessive force. The District Court ruled in favor of Kisela but the Ninth Circuit Court of Appeals reversed that, ruling that the evidence “was sufficient to demonstrate that Kisela violated the Fourth Amendment” and that it was clearly established that the shooting was improper.

Kisela requested review and the U.S. Supreme Court granted certiorari.

**ISSUE:** Is an officer entitled to qualified immunity if the law is not clearly established?

**HOLDING:** Yes

**DISCUSSION:** The Court looked back to the seminal case of Tennessee v. Garner,<sup>11</sup> in which it was held “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” In Graham v. Connor,<sup>12</sup> the Court noted that the evaluation of the case “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” And, the Court continued, “[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”

In this case, the Court agreed, it did not need to “decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.” For the law to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.”<sup>13</sup>

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<sup>11</sup> 471 U.S. 1 (1985).

<sup>12</sup> 490 U.S. 386 (1989).

<sup>13</sup> White v. Pauly, 580 U.S. --- (2017).

The Court noted that “Kisela had mere seconds to assess the potential danger to Chadwick.” It was clearly not incorrect to use deadly force to protect a third party (Chadwick) in the circumstances before the officers. The Court discounted the case law relied upon by the Ninth Circuit, reversed its decision and ruled that Kisela was entitled to qualified immunity.

### **Byrd v. U.S., 138 S.Ct. 1518 (2018)**

**FACTS:** In September, 2014, Pennsylvania State Police troopers made a traffic stop of Byrd, the sole occupant of a rental car. Trooper Long, who made the stop, later indicated he was suspicious of the way Byrd was driving. Byrd was visibly nervous and was found not to be an authorized driver of the rental car he was operating. Later investigation indicated that another individual had served as, in effect, a straw renter, and have given the keys to Byrd as soon as it was rented. During the investigation, they discovered an out of state warrant, but that state refused to extradite. Byrd admitted there was marijuana in the car. The troopers at the scene attempted to get consent, but agreed that since he was not an authorized driver, he had no expectation of privacy in the vehicle. Upon a search, 49 bricks of heroin and body armor were found in the trunk.

Byrd moved to suppress the fruits of the trunk search. Trooper Long also argued at the suppression hearing that the search was also justified under the vehicle exception doctrine, but the trial court ruled that Byrd lacked standing to object, as he had no expectation of privacy, and did not reach that issue. Byrd took a conditional guilty plea and appealed. The Court of Appeals upheld his plea based on Byrd being an unauthorized driver and did not address the second justification.

Byrd petitioned for certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May an unauthorized driver in a rental vehicle still have an expectation of privacy in that vehicle?

**HOLDING:** Yes

**DISCUSSION:** The Court acknowledged that “there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search.”<sup>14</sup> The Court summed up the precise question as: “Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?” Although an owner would always have that right, “a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it.”<sup>15</sup> Simple presence isn’t enough, however, to convey that right. The Court made a distinction between passengers, who may lack that right depending upon the circumstances, and sole occupant drivers.

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<sup>14</sup> California v. Acevedo, 500 U. S. 565 (1991).

<sup>15</sup> See Jones v. U.S., 362 U. S. 257 (1960) Mancusi v. DeForte, 392 U. S. 364 (1968); Minnesota v. Olson, 495 U. S. 91 (1990).

Continuing:

The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in Jones owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude.

The Court agreed that in Rakas, it had agreed that the “‘wrongful’ presence at the scene of a search would not enable a defendant to object to the legality of the search.”<sup>16</sup> The Government had argued that since Byrd knew he could not lawfully rent the vehicle on his own based on his criminal record, so he may have committed a crime by using another person to do so. However, the Government’s argument was not made at the lower courts and, as such, could not be considered for the first time on appeal.

The Court noted, also, that the Government did argue that the troopers had probable cause to believe that the vehicle contained contraband, based on Byrd’s admission of having marijuana. The Court agreed that was proper for the District Court to address, and remanded the case with the ruling that Byrd did have a reasonable expectation of privacy and thus standing to contest the search.

### **Collins v. Virginia, 138 S.Ct. 1663 (2018)**

**FACTS:** Officer McCall (Albemarle County, VA, PD) observed a distinctive motorcycle commit a traffic violation. The driver avoided the officer’s attempt to stop him. A few weeks later, Officer Rhodes saw a similar motorcycle speeding, but he also lost him. The officers agreed that it was the same motorcycle. They determined it was likely stolen, and that Collins had possession of it. Collins’ Facebook account included a photo of what appeared to be the same motorcycle at the top of a driveway. Further investigation indicated that the home was Collins’ girlfriend, and that he stayed there a few nights a week. (Virginia did not dispute that Collins had an expectation of privacy, and standing, at the house.<sup>17</sup>)

Officer Rhodes observed what appeared to be a motorcycle, with an extended frame, covered with a tarp. It was “at the same angle and in the same location” as indicated in the Facebook photo. Officer Rhodes walked toward the house, took a photo of the motorcycle from the driveway, and then walked up the driveway. He pulled back the tarp, finding a motorcycle that appeared to be the suspect vehicle. Officer Rhodes ran the license plate and VIN, and confirmed it was stolen. He photographed and replaced the tarp, and returned to his car. When Collins arrived soon thereafter, Officer Rhodes approached the house and knocked. Collins admitted

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<sup>16</sup> Rakas v. Illinois, 439 U.S. 128 (1978).

<sup>17</sup> Minnesota v. Olson, 495 U.S. 91 (1990).

that the motorcycle was his and that he'd bought it without title. He was then placed under arrest.

Collins was indicted for receiving stolen property. He moved to suppress the evidence obtained when Rhodes removed the tarp and, in effect, searched the motorcycle. The trial court denied his motion and he was convicted, which was affirmed by the Virginia appellate courts, but the Virginia Supreme Court affirmed on the basis of the "automobile exception" rather than the exigency argument used by the lower courts. It found Officer Rhodes had probable cause to believe the motorcycle was contraband, and that the warrantless search was justified.

Collins petitioned for certiorari, and the U.S. Supreme Court granted review.

**ISSUE:** Does the "automobile exception" justify an entry into the curtilage to obtain evidence?

**HOLDING:** No

**DISCUSSION:** The Court began:

This case arises at the intersection of two components of the Court's Fourth Amendment jurisprudence: the automobile exception to the warrant requirement and the protection extended to the curtilage of a home.

The Court reviewed the "so-called automobile exception in Carroll v. U.S.<sup>18</sup>" The exception is justified by the "ready mobility" of vehicles.<sup>19</sup> Additional justification evolved "based on 'the pervasive regulation of vehicles capable of traveling on the public highways.'" The Court emphasized that the rationale behind the doctrine "applied only to automobiles and not to houses, and therefore supported "treating automobiles differently from houses" as a constitutional matter."<sup>20</sup>

Moving to curtilage, the Court noted that "[W]hen it comes to the Fourth Amendment, the home is first among equals."<sup>21</sup> Further, curtilage "the area 'immediately surrounding and associated with the home'"—to be "part of the home itself for Fourth Amendment purposes." As such, when an officer "physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant."

The Court reviewed how the motorcycle was positioned at the house. The Court agreed that part of the driveway, which was partial enclosed at that point, was certainly within the curtilage. As such, the question is, whether the automobile exception justified that invasion. The Court agreed

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<sup>18</sup> 267 U. S. 132 (1925).

<sup>19</sup> California v. Carney, 471 U. S. 386 (1985) (citing, e.g., Cooper v. California, 386 U. S. 58 (1967); Chambers v. Maroney, 399 U. S. 42 (1970)).

<sup>20</sup> Cady v. Dombrowski, 413 U. S. 433 (1973).

<sup>21</sup> Florida v. Jardines, 569 U. S. 1 (2013).

it did not, as such exception is also premised on the requirement that the vehicle in question be in a public place. Nothing in the case law gave the officer the right to enter to curtilage to access the suspect vehicle. The court equated it, for example, to *Payton*, which denotes that “absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause.”<sup>22</sup> “Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.”

The Court continued:

As noted, the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house. The rationales thus take account only of the balance between the intrusion on an individual’s Fourth Amendment interest in his vehicle and the governmental interests in an expedient search of that vehicle; they do not account for the distinct privacy interest in one’s home or curtilage. To allow an officer to rely on the automobile exception to gain entry into a house or its curtilage for the purpose of conducting a vehicle search would unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application. Indeed, its name alone should make all this clear enough: It is, after all, an exception for automobiles.

The Court disagreed with arguments put forth by Virginia, and noted that “the ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible.”<sup>23</sup> A partially enclosed carport, for example, is curtilage, just like an enclosed garage. It would also provide rights to those who can afford garages over those without resources to have such an enclosed structure. It agreed that “the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion”<sup>24</sup>.

The Court concluded that the “automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein.”

The Court reversed the judgement of the Supreme Court of Virginia and remanded the case. The Court noted, however, that it left open the question that the officer’s “warrantless intrusion on the curtilage of Collins’ house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement.”

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<sup>22</sup> *Payton v. New York*, 445 U. S. 573 (1980).

<sup>23</sup> *California v. Ciraolo*, 476 U. S. 207 (1986).

<sup>24</sup> See *U.S. v. Ross*, 456 U. S. 798 (1982)

**Lozman v. City of Riviera Beach, Florida, 138 S.Ct. 1945 (2018)**

**FACTS:** In 2006, Lozman became a resident on a “floating home” in Riviera Beach, Florida, having docked the structure in the city-owned marina. He soon developed a “contentious relationship” with the City, as he became an “outspoken critic” of the City’s development plans for the waterfront. He spoke often during public meetings and filed a lawsuit against the City on an open records claim.

In June 2006, the Council held a closed door session to discuss Lozman’s lawsuit. Pursuant to a transcript of that meeting, it was suggested the City “use its resources to ‘intimidate’ Lozman” and others involved in litigation. Other councilmembers agreed, although there was dispute as to whether they actually planned to intimidate Lozman or simply aggressively respond to the litigation.

Subsequently Lozman “became embroiled in a number of disputes” which he claimed were part of the City’s plan to retaliate against him. In November 2006, he spoke at a public meeting and was told to “stop making” remarks. He continued to speak. A council member called for the police officer present to remove Lozman from the podium. When Lozman still refused, the officer was told to “carry him out;” the officer handcuffed Lozman and escorted him out. Lozman was arrested for failure to follow the rules “by discussing issues unrelated to the city” and then refusing to leave. Lozman claimed the arrest was in retaliation for his public speaking. Ultimately, the criminal case was dismissed although the prosecutor agreed there was probable cause for the arrest under Florida law.

Lozman filed suit under 42 U.S.C. §1983. He described a number of alleged incidents that he claimed showed the City’s intent to harass him, including a case involving his floating home that went to the U.S. Supreme Court in 2013 which Lozman won. Ultimately, the trial court returned a verdict for the City. Lozman appealed only the issue of the “alleged retaliatory arrest” at the November 2006 city council meeting. The Eleventh Circuit upheld the verdict for the City.

Lozman requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May a case be pursued for a retaliatory arrest under the First Amendment even if probable cause for the arrest exists?

**HOLDING:** Yes

**DISCUSSION:** Lozman did not challenge the underlying criminal statute under which he was charged or the ability of the City Council to limit speech at its events. However, he did challenge the lawfulness of his arrest although he conceded there was probable cause under the statute for it – as he did refuse to leave the podium once he was ordered to do so. He contended, however, that the arrest was in retaliation for his public speaking, which was protected activity.

The Court agreed that a lawsuit against the City required that the harm be connected to an “official municipal policy.”<sup>25</sup> The central point, however, it identified was whether the concession of probable cause for the arrest “bars recovery regardless of any intent or purpose to retaliate for past speech.” The Court looked to Mt. Healthy City Bd. Of Ed. v. Doyle<sup>26</sup>, a civil case, and Hartman v. Moore.<sup>27</sup> The Court agreed that difficult questions arise “about the scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity.” Lozman did not sue the officer who made the arrest, who appeared to have acted in good faith, and there was no evidence the officer knew of the prior issues. The Court agreed that an “official retaliatory policy “is a particularly troubling and potent form of retaliation.” In such cases, the “government itself orchestrates the retaliation.” The Court agreed that Lozman’s speech was “high in the hierarchy of First Amendment values.”

The Court ruled that Lozman did not need to “prove the absence of probable cause to maintain a claim of retaliatory arrest against the City.” The Court did not render an opinion as to whether Lozman might ultimately be successful in his lawsuit, but reversed the Court of Appeals and remanded the case for further proceedings.

### **Carpenter v. U.S., 138 S.Ct. 2206 (2018)**

**FACTS:** In the spring and summer of 2011, police apprehended four men accused of armed robberies in the Detroit area. One of the accused gave his own cellphone number to the FBI, as well as those of other participants. Call records were used to identify “still more numbers” of possible conspirators. The FBI applied for three orders to request “transactional records” for 16 numbers, from various wireless carriers. The accounts for Carpenter and Sanders were among those requested. The warrants were issued under the Stored Communications Act, 18 U.S.C. 2703(d), which allows such disclosure when the evidence provides reasonable grounds that the information would be “relevant and material to an ongoing criminal investigation.” Using that information, gathered through an analysis of 127 days of back data, the conspirators were able to be localized to the area of each robbery, in varying levels of precision.

Carpenter and Sanders were charged with interstate robbery. They moved to suppress the cell-site evidence, claiming that probable cause was required for the disclosure. The District Court denied the motion. Both men were tried, and the cell site data for the two men was presented, with an agent testifying how the records indicated that both phones were in close proximity to the location of each robbery, at the time it occurred.

Both men were convicted, and appealed. The U.S. Sixth Circuit agreed that the federal courts have long made a distinction between the “content” of a personal communication and the “information necessary to get those communications from Point A to Point B.” The initial cases, of course, applied to physical mail, but the law was eventually applied to telephone calls in the same way. Federal law now accords that same protection to email and similar communications,

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<sup>25</sup> Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

<sup>26</sup> 429 U.S. 274 (1977).

<sup>27</sup> 547 U.S. 250 (2006).

as well.<sup>28</sup> However, up to this point, the courts had not yet “extended those protections to the internet analogous to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses.” The Sixth Circuit agreed that cell-site data, much like metadata in emails, was the “envelope” rather than the contents of a communication. As such, it was entitled to lesser privacy rights.

The Sixth Circuit agreed that such locational data was not subject to any expectation of privacy.<sup>29</sup> Any cell phone user understands that their location is being transmitted to a tower and that the carriers keep a record of the location from which calls are being made. These records are not extremely precise, as noted by the facts of the case – in which the phones could only be placed in a ½ mile to two mile radius.

The Sixth Circuit agreed that the business records of cell phone locations are not a search under the Fourth Amendment. Carpenter requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a search warrant required for access to cell site location information for historical data?

**HOLDING:** Yes

**DISCUSSION:** The Court began with a review of the history of the Fourth Amendment, and its beginning being tied with physical intrusions on areas in which an individual expects privacy. In modern times, however, the concept of privacy has expanded beyond physical boundaries. When applying such principles to “innovations in surveillance modes,” the Court faced a challenge to find a balance. Specifically, the court looked at Kyllo v. U.S.<sup>30</sup>, which dealt with thermal imaging technology, and Riley v. California<sup>31</sup>, which addressed the storage inside a cell phone. The Court acknowledged that it faced the hurdle of anticipating new technologies

The Court acknowledged that this case fell at the juncture of two Fourth Amendment doctrines: the issue of an expectation of privacy in information handed over to third parties. In the first, in the past, a lesser expectation of privacy has been accorded traditionally, but “that does not mean that the Fourth Amendment falls out of the picture entirely.” Although the information is provided voluntarily in one sense, the use of cell phones has become so pervasive that “carrying one is indispensable to participation in modern society.” Unless the phone is disconnected from the network, there is “no way to avoid leaving behind a trail of location data.”

The Court continued with a review of the technology of cell phone and how they might be located using cell phone tower triangulation. The tremendous power available to essentially track an individual’s movements, precisely, as far back as one’s cell phone carrier maintains records, was

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<sup>28</sup> U.S. v. Warshak, 631 F.3d 266 (6<sup>th</sup> Cir. 2010).

<sup>29</sup> Smith v. Maryland, 442 U.S. 735 (1979).

<sup>30</sup> 533 U.S. 27 (2001).

<sup>31</sup> 573 U.S. 2014.

difficult to imagine even a few years ago. As in the issue with *Kyllo*, the less-precise technology today is likely to evolve into the more precise technology tomorrow. Although at the time the *Carpenter* case began, it acknowledged, the location of the cell phone could only be described in fairly general terms, that technology has continued to improve in the interim and can only be expected to continue to become more and more precise.

The Court also noted that cell phones have become “almost a ‘feature of human anatomy’” with research indicating that the majority of individuals “compulsively carry cell phones with them all the time.” Although vehicles may be left behind, the “cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.” In fact, it equated to the government attaching an ankle monitor to the user. Further, using the cell-site location information (CSLI), the police could “travel back in time to retrace a person’s whereabouts,” limited only by the retention cycle of the carrier. Further, officers do not even need to decide who they wish to “follow” in advance. Certainly, cell-site records are business records, held by a third-party, but the cell phone companies are “ever alert, and their memory is nearly infallible,” as the companies continually, and almost casually, collected an “exhaustive chronicle of location information.”

The Court concluded that in this factual scenario, law enforcement must obtain a warrant, based upon probable cause – specifically to obtain historical location data on a cell phone user. However, the Court noted that the decision was to be construed narrowly and that “real-time CSLI” of a specific user or “tower dumps” – a “download of information on all the devices that connected to a particular cell site during a particular interval – triggered different possibilities. The Court also noted that it did not “consider other collection techniques involving foreign affairs or national security.” It allowed that exigent circumstances would also apply and would justify not obtaining a warrant.

The Court reversed the Sixth Circuit Court of Appeals, and remanded the case for further proceedings.

### **Sexton (Warden) v. Beaudreaux, 138 S.Ct. 2555 (2018).**

**FACTS:** Beaudreaux shot and killed Drummond, during a 2006 argument. Escho and Crowder were witnesses. Crowder stated he knew the shooter from middle school but did not know his name, while Escho could also describe, but did not know, the shooter. Crowder, when in custody months later, was shown a middle school yearbook, as well as a photo lineup, that included Beaudreaux. Crowder identified him as the shooter. Escho was interviewed and shown a photo array with a recent picture, and he tentatively identified him. When shown a photo taken closer to the crime, in a separate array, he picked out Beaudreaux as “very close” – but refused to identify him positively. He said he needed to see him in person to be sure at a preliminary hearing, he did positively identify him based upon the way he walked.

Both men testified and identified Beaudreaux at trial. He was convicted, and his conviction affirmed through the state court system. In the federal system, he argued that his attorney was ineffective in that he did not object to the introduction of Escho’s identification testimony.

Eventually, the Ninth Circuit Court of Appeals reversed his conviction, determining that the attorney should have objected as the identification was “unduly suggestive,” because Beaudreaux’s photo was in both array, albeit different photos.

The State of California petition for certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is the reliability of a suspect identification a case-by-case evaluation?

**HOLDING:** Yes

**DISCUSSION:** Although this case was decided on “ineffective assistance of counsel,” grounds, the Court address the proper approach to use when suppression of an eyewitness identification is “tainted by police arrangement.”<sup>32</sup> In particular, the Court has said that “due process concerns arise only when law enforcement officers use[d] an identification procedure that is *both* suggestive and unnecessary.”<sup>33</sup> To be “impermissibly suggestive,” the procedure must “give rise to a very substantial likelihood of irreparable misidentification.”<sup>34</sup> Although the process need not be ideal, an error will not necessarily mandate suppression. The trial courts are expected to assess the matter on a case-by-case basis, to determine if it could have led to a “substantial likelihood of misidentification.”

The question will center on the reliability of the identification, including: “the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” Reviewing the record on Esho’s identification, it was objectively reasonable to find he made a reliable identification.

The Court reversed the Ninth’s Circuit’s ruling and remanded the case for further proceedings consistent with its decision.

### **KENTUCKY AND 6<sup>TH</sup> CIRCUIT CASES**

#### **Brown v. Com., 553 S.W.3d 826 (Ky. 2018)**

**FACTS:** In a complex factual situation, Brown was charged with kidnapping, robbery and the attempted murder of O’Connor. Specifically, Brown assisted others who had already seized O’Connor in another county. Others transported O’Conner from Hardin County, when the initial crime occurred, to Meade County where Brown stabbed her three times and fled the scene.

Ultimately, Brown was convicted and appealed.

**ISSUE:** Are stabbing injuries to the lungs a “serious physical injury?”

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<sup>32</sup> *Perry v. New Hampshire*, 565 U.S. 228 (2012).

<sup>33</sup> *Id.*, at 238–239 (citing *Manson v. Braithwaite*, 432 U. S. 98 (1977), and *Neil v. Biggers*, 409 U. S. 188 (1972)).

<sup>34</sup> *Id.*, at 197 (quoting *Simmons v. U.S.*, 390 U. S. 377 (1968)).

**HOLDING:** Yes.

**DISCUSSION:** The victim died before trial and thus was unable to testify as to the seriousness of the injuries she sustained. The Court noted that under the Kidnapping charge, the penalty was enhanced if there as a finding of serious physical injury. Medical testimony indicated the victim suffered a punctured lung and a pneumothorax, and spent several days in the hospital. Brown argued that although there was the potential for serious complications, O'Connor did not have those complications and made a full recovery from those injuries. The Court held that it was proper for the jury to find that the stabbing, and the pneumothorax, was itself a serious physical injury.

The Court also held that even though the stabbing occurred in Meade County, Brown's trial in Hardin County was proper because much of the event occurred in that county. Although other cited cases resulted in two trials in multiple counties, the Court determined that it was unnecessary to go to that expense. After resolving several other issues, the Court agreed that Brown's convictions were proper.

**Com. v. Caudill, 540 S.W.3d 364 (Ky. 2018)**

**FACTS:** Caudill was accused of the shooting death of Carpenter, a neighbor, with whom he'd had a tumultuous relationship. Several others lived in the same area and witnessed the altercation, in which both men were armed. Both fired shots that struck the other, but only Carpenter died. The three witnesses were forced to seek cover as the firing commenced. Caudill was charged, and claimed self-defense. He was convicted of Murder in Breathitt County, as well as Wanton Endangerment. The convictions were overturned and he was retried. That jury found him guilty of Wanton Endangerment, for the three witnesses, but not Murder. Caudill appealed. The Court of Appeals found in his favor and the Commonwealth appealed.

**ISSUE:** Is the wanton state of mind applicable in a self-defense case?

**HOLDING:** No

**DISCUSSION:** Caudill argued that it was illogical to find he acted in self-defense in the murder charge and still find him guilty of wanton endangerment of other victims in the same shooting. The Court noted that KRS 503.120(2) "precluded justification as a defense to crimes involvement wantonness or recklessness towards innocent victims, even when the defense is available as to another victim."<sup>35</sup> The instructions to the jury were not as clear as they should have been on the issue, but the error was harmless.

The Court reinstated his convictions.

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<sup>35</sup> Justice v. Com., 608 S.W.2d 74 (Ky. 1980).

**Caldwell v. Com., 554 S.W.3d 874 (Ky. App. 2018)**

**FACTS:** On July 31, 2015, Caldwell took three siblings, long time family friends, shopping and then offered to “keep them” for the rest of the day, and then for an overnight. The 14-year-old girl later alleged that Caldwell made approaches to her and touched her breasts over her clothing. He grabbed her and kissed her, and she was able to extricate herself and rejoin her younger siblings. She told her parents the next day and her father confronted Caldwell. Caldwell claimed all he did was give her a back rub but admitted he had “messed up.”

Caldwell was ultimately convicted of sexual abuse and found to be in a position of special trust, which enhanced his penalty. He appealed.

**ISSUE:** May a family friend be in a “position of special trust?”

**HOLDING:** Yes

**DISCUSSION:** The Court noted that while not all family friends might not be in that position, the decision lay with the jury. The victim had testified that Caldwell was like family, was regularly present, and that she trusted and felt comfortable with him. The victim and her two siblings were spending the night with him as the “adult in charge.” The Court held that the jury’s finding was properly supported.

**Hall v. Com., 551 S.W. 3d 7 (Ky. 2018)**

**FACTS:** On the day in question, Hall fled from a Walmart in Perry County, as a shoplifting suspect. He drove away and was spotted by Officer Everidge (Hazard PD). Hall pulled over but immediately fled on foot. Everidge pursued as did Officer Maggard, on foot. Hall circled back and got into Officer Maggard’s cruiser. He sped away. Officers Everidge and Jones pursued at a high rate of speed. They found the cruiser abandoned, within a half hour. Hall was arrested a few days later.

Hall was convicted of Theft, for the cruiser, as well as resisting arrest and Wanton Endangerment. He appealed.

**ISSUE:** Is taking a cruiser to escape necessarily a theft?

**HOLDING:** No

**DISCUSSION:** Hall argued that there was no evidence that he intended to deprive the department of its cruiser, and that he should have been given a directed verdict on that charge.

The Court noted:

Hall's argument implicates a larger issue surrounding KRS 514.030(1)(a) and 514.010(1)--specifically, the meaning of, *intent to deprive* under the first definition of *deprive* given in KRS 514.010(1)(a), i.e. possessing the *intent to withhold property of another permanently*. KRS 514.030(1)(a) states, "[A] person is guilty of theft by unlawful taking or disposition when he unlawfully: Takes or exercises control over \_movable property of another *with intent to deprive* him thereof." KRS 514.010(1) defines *Deprive* to mean: "(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value or with intent to restore only *upon* payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."

The Court reviewed the four definitions of deprive in the statute. It noted that he stole a marked cruiser and had to be aware that the officers were in pursuit of him. He left the vehicle in the middle of the road, where it would clearly be seen. He certainly did not intend to withhold the cruiser permanently. It agreed that "To interpret correctly *intent to withhold property of another permanently* is to say that the defendant intends that the property never be restored to its rightful owner, where intent can be inferred from facts and circumstances." Evidence could show, as it did in this case, that Hall intended that the vehicle be available to be restored to the police department. Instead of theft, the Court agreed, he was simply trying to evade the police, to get away.

The Court looked to previous cases: Waddell, Byrd, Lawson, and Caldwell have held, the taking and abandoning of property could allow the jury to infer that the defendant had the intent to withhold permanently the victim's property from the victim, i.e. intending that the property never be restored to the true owner.<sup>36</sup>

In this decision, the Court agreed, it overruled any past precedent that conflicts with its decision that under such circumstances, theft is not an appropriate charge. It acknowledged that a proper charge in this case would have been, for example, Unauthorized Use.

The Court upheld a conviction for Wanton Endangerment, with Officer Everidge as the victim, given the circumstances of the struggle that occurred as he took the cruiser.

### **Sykes v. Com., 550 S.W.3d 60 (Ky. App. 2018)**

**FACTS:** On May 7, 2016, Lexington officers were dispatched to a shots fired call. Upon arrival, the officers approached a vehicle that was parked and running on the side of the road. When an officer approached, Sykes rolled down the window. Thereafter, the officers smelled marijuana. When Sykes emerged from the vehicle and raised his arms as ordered, the officers spotted a concealed firearm in his waistband. Marijuana, cash and another firearm were located in the vehicle.

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<sup>36</sup> See Waddell v. Com., No. 2013-SC-000499-MR, 2014 WL 2810080 (Ky. June 19, 2014); Byrd v. Com., No. 2007-SC-000706-MR, 2008 WL 5051612 (Ky. Nov. 26, 2008); Caldwell v. Com., 133 S.W.3d 445 (Ky. 2004); Lawson v. Com., 85 S.W.3d 571 (Ky. 2002).

Among other charges, Sykes was charged with carrying a concealed firearm. He was convicted and appealed.

**ISSUE:** Is a gun revealed only when someone raises their arms concealed for purposes of Kentucky law?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the issues of “concealed,” looking to Vega v. Com.<sup>37</sup> It acknowledged the statute did not provide a precise definition, but that case law did. The Court noted that a weapon is concealed when it is not “observed by persons making ordinary contact with him in associations such as are common in the everyday walks of life.”<sup>38</sup> In this case, the officers did not see the weapon until he raised his arms, causing his shirt to rise as well. That was fully described in testimony to the jury.

The Court affirmed his conviction.

#### **Dunn v. Thacker, 546 S.W.3d 576 (Ky. App. 2018)**

**FACTS:** Thacker and Dunn shared a child in Powell County. Thacker filed a petition for a DVO on behalf of the child, who lived with Dunn and her boyfriend. Dunn advised Thacker via text that the boyfriend had physically abused the child. Dunn stated she had sent the text, but contended she was trying to force a reconciliation with Thacker. The court was “unswayed” by her argument and issued a DVO against Dunn, who had allowed the boyfriend to abuse the child. (Dunn admitted she intended to marry the boyfriend.)

The trial court awarded temporary custody to Thacker, with visitation with Dunn to be supervised by the grandparents. Dunn appealed, arguing that the alleged domestic violence was committed by the boyfriend and not her, yet the order was directed to her.

**ISSUE:** May a DVO be issued against a parent who allows another to harm their child?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that “Dunn’s very inaction in the face of harm inflicted on her child ... is tantamount to abuse.” In Lane v. Com., the Kentucky Supreme Court had carved out a “new interpretation of parental responsibility and accountability for children.”<sup>39</sup> In a situation similar to that involving Dunn, the abuse was against a child by a domestic companion, and the Court agreed that a parent had a duty to protect the child in such situations. KRS 620.050(1)

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<sup>37</sup> 435 S.W.3d 621 (Ky. 2013).

<sup>38</sup> [Avery v. Com., 223 Ky. 248, 3 S.W.2d 624, 626 (1928)].

<sup>39</sup> Lane v. Com., 956 S.W.2d 874 (Ky. 1997).

requires reporting of abuse by “any person” which of course would include the actual parents of the child.

Further, clearly, she was aware of the abuse against the child, as evidenced by the texts sent to Thacker. Although she claimed that she lied in those texts, “when someone appears before a court and admits to lying while insisting that she is now telling the truth with zero corroborating evidence, a court would rightfully be suspicious of such testimony.”

The court affirmed the issuance of the DVO.

**Com. v. Riker, 2018 WL 6564681 (Ky. 2018)**

**FACTS:** In August, 2014, Riker was arrested for DUI in Lexington. His FSTs indicated impairment and his PBT was exceptionally high. He submitted to an Intoxilyzer test, which registered a .266. He then asked for an independent blood test and was taken to the UK Medical Center, which told him the test would be \$450. As he only had \$100, he asked to be taken back to jail. He moved to have the Intoxilyzer result dismissed because he was not able to have his own test, and was denied. The Fayette Circuit Court reversed, concluding that the cost effectively denied him his statutory right to an independent blood test, and suppressed the official results. The Court of Appeals affirmed the circuit court. The Commonwealth appealed.

**ISSUE:** Are hospitals limited on how much can be charged for an independent test?

**HOLDING:** No.

**DISCUSSION:** The Court agreed that there were two statutes at issue, KRS 189A.103(7) and .105(4). With respect to the independent test, the officer was required to make ‘reasonable efforts’ to provide transportation to the test site, if requested. The Court noted that the law enforcement officers did what they were required to do and that regulating the cost of the test was beyond the purview of the courts. That belonged to the legislature instead. As such suppression of the evidence obtained by law enforcement was not appropriate.

The Court reversed the decision of the Court of Appeals and permitted the evidence to be admitted.

**Com. v. Crosby / Spellman, 2018 WL 3193074 (Ky. App. 2018)**

**FACTS:** On December 8, 2015, Sgt. Brown (Oldham County PD) approved a traffic checkpoint for the evening of December 11. No advance notice was provided to the media and no signs were posted as to an approaching checkpoint. There was no written policy on checkpoints. A number of uniformed officers assembled to do the checkpoint. Sgt. Brown briefed the officers on the process. Most of the vehicles were lighted to provide notice and safety.

Spellman approached in his vehicle. Officer Flynn smelled alcohol and directed Spellman into the adjacent parking lot, as was the plan for such situations. Spellman did not perform well on FSTs and admitted to consuming “two beers.” He was arrested and transported to the jail by Officer Lay, who watched in the rear view mirror en route. He started the observation period about 12 miles from the jail, and directed Spellman not to eat, drink, etc. The officer sat with Spellman in the cruiser at the jail, typing the citation. He then gave Spellman the implied consent form, and Spellman submitted to the Intoxilyzer test. Spellman denied having brought up anything from his stomach and the test was performed. He was charged with DUI, refused an attorney and did not seek an independent test.

Spellman sought suppression of the checkpoint and the BAC, arguing the latter’s observation period did not occur at the test location. At the hearing, it was undisputed that the entire 20 minutes did not occur at the jail. The district court ruled against the prosecution after finding that the checkpoint did not accord with Buchanon and that the BAC was improperly performed. The Circuit Court affirmed on appeal, and the Commonwealth appealed to the Court of Appeals.

**ISSUE:** Must the entire observation period in a DUI take place where the instrument is actually located?

**HOLDING:** Yes.

**DISCUSSION:** The Court noted that at the time, a written policy, warning signs and advance media notice was recommended, but not mandatory. However, it agreed, the lack of these items confirmed the proper procedures were not in place.

With respect to the BAC, the Court agreed that observation in the cruiser did not satisfy the requirements and that the entire observation must occur where the instrument is located. Although he was in Lay’s custody, Lay was driving down a dark, rural road, presumably with the interior car lights off. At the jail, the officer was focused on writing the citation as well. As such, anything could have happened in the cruiser that might affect the results.

The Court affirmed the conviction.

**U.S. v. Kemp, 732 Fed.Appx. 368 (6<sup>th</sup> Cir. 2018)**

**FACTS:** An “astue Texas State Trooper” found a large quantity of cocaine in a concealed location in a car being transported from Arizona to Michigan. That led to a controlled delivery of a substance substituted for the cocaine. During a surveillance, this car and the substance, along with two other vehicles, were followed to a Detroit location. There, three men were arrested from the vehicle (a SUV) which stopped. Other officers followed the third vehicle until it stopped. Kemp (the passenger) and its driver were arrested.

Officers obtained a warrant for another address, identified as the residence of one of the first men arrested. There items were found connected to Kemp, including his passport. All were

charged with drugs and conspiracy, along with related charges. Kemp was convicted of attempting to possess with intent to distribute, and appealed.

**ISSUE:** Must a nexus be shown between criminal activity and the location for which the warrant is sought?

**HOLDING:** Yes.

**DISCUSSION:** Kemp argued that the search warrant did not establish a nexus between the criminal activity and the location. The Court held that the specific information outlined in the affidavit made an adequate connection between all the parties involved and the location.

The Court affirmed Kemp's conviction.

**U.S. v. McCoy / Heard, 905 F.3d 409 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In 2016, Cincinnati police received a CI tip that McCoy and Heard (with another) were selling marijuana from two adjacent stores. McCoy and Heard shared a home at another location, as well. The CI reported having seen marijuana in guns in that home. Officer Longworth began surveillance and noted a great deal of foot traffic. He knew that the two men had drug-trafficking histories. On October 14, McCoy saw Heard and Brown park illegally, which led to Brown being arrested for an unrelated crime. He then spotted Heard walking out of the store (where they were parked) with a large bag of marijuana "hanging from his pants." He too was arrested.

Using all this information, officers obtained a warrant, but found no narcotics in the stores. They obtained a second search warrant for the home where a large amount of heroin, marijuana, \$38,000 in cash, paraphernalia, and a gun were found.

Both men were charged with federal drug trafficking offenses. Both men moved to suppress both warrants. The trial court upheld the store warrant, but the home warrant "did not fare as well." The Court found an insufficient nexus to link the criminal activity with the home and vacated the warrant. The Government appealed.

**ISSUE:** Will good faith reliance on a search warrant that was erroneously issued permit the admissibility of evidence obtained as a result of the execution of that warrant?

**HOLDING:** Yes.

**DISCUSSION:** The Court noted that when a warrant is held to be insufficient, it is possible the good faith rule – Leon – might apply. Although it is the responsibility of the judge to ensure a warrant is valid:

... judges sometimes make mistakes. When this happens, law enforcement may obtain a warrant that it shouldn't have obtained and search a place that it shouldn't have searched. The exclusionary rule usually prevents the government from using illegally obtained evidence in a criminal proceeding against the victim of the unlawful search and seizure.<sup>40</sup> A magistrate judge's error in issuing a search warrant, however, does not always require suppression of reliable evidence.<sup>41</sup> In United States v. Leon, the Supreme Court created an exception to the exclusionary rule.<sup>42</sup> The Court held that when an officer relies on a search warrant later invalidated, evidence obtained from the warrant-authorized search is admissible unless reasonable officers would not have believed the warrant constitutionally permissible. As the Court explained, the judge issuing a warrant—not the officer applying for one—has responsibility for determining whether probable cause exists, and the rule excluding unlawfully obtained evidence has little deterrent effect when applied to objectively reasonable law enforcement activity. Thus, any benefit derived from excluding evidence in these situations cannot justify the substantial costs of exclusion.

The Court noted that “[t]o infer permissibly that a drug-dealer’s home may contain contraband, the warrant application must connect the drug-dealing activity and the residence. Typically, this will require some “facts showing that the residence had been used in drug trafficking, such as an informant who observed drug deals or drug paraphernalia in or around the residence.”<sup>43</sup> Further, “under the continual-and-ongoing-operations theory, we have at times found a nexus between a defendant’s residence and illegal drug activity with no facts indicating that the defendant was dealing drugs from his residence.”<sup>44</sup>

The Court held that there was a sufficient inference that since there were no drugs at the stores, which did have evidence of trafficking, it was reasonable to expect to find drugs at the home shared by the suspects. Although the evidence was not strong, “this case is about law enforcement’s good-faith reliance on the warrant. And we have explained that “reasonable inferences that are not sufficient to sustain probable cause in the first place may suffice to save the ensuing search as objectively reasonable.”

The Court reversed the decision to suppress the evidence found in the home search.

### **U.S. v. Tagg, 886 F.3d 579 (6<sup>th</sup> Cir. 2018)**

**FACTS:** This case revolves around the use of the “dark web” to distribute child pornography. Through the use of a web browser called Tor, clandestine sites can shield users from having an “online face” – the IP address - on the internet. It can also hide a website from

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<sup>40</sup> See Illinois v. Krull, 480 U.S. 340 (1987).

<sup>41</sup> See U.S. v. McPhearson, 469 F.3d 518 (6<sup>th</sup> Cir. 2006).

<sup>42</sup> 468 U.S. at 922.

<sup>43</sup> Brown, 828 F.3d at 383.”

<sup>44</sup> U.S. v. Gunter, 551 F.3d 472, 481 (6<sup>th</sup> Cir. 2009).

search engines, which requires users to know the exact URL to find it. Such sites are “an island that cannot be found, except by those who already know where it is.”

However, nothing is totally secret and there are ways to circumvent Tor’s mask. In this case, the FBI gained access to the physical computer managing the website for Playpen, a site on the dark web, using a NIT warrant that places a digital bug into the fabric of the website. Using data collected, they sought individual warrants for identified users, which required the affidavit to describe the process. For Tagg, they specifically detailed his computer usage and what he was searching for with Playpen, which include child pornography. In the subsequent search, some 20,000 files of child pornography were found.

The trial court held the warrant to be invalid and would only satisfy probable cause if it could be shown he clicked on or opened a site with prohibited material. The U.S. appealed.

**ISSUE:** May probable cause be shown by a subject visiting a website that includes child pornography, even if that site also includes legal material?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that probable cause “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” The Court agreed that the unique challenges posed by a child pornography case require a practical approach and noted that it had previously held that “visiting or subscribing to a website containing child pornography creates a reasonable inference” that it will be found on the person’s computer.<sup>45</sup> This is not changed simply because the website also includes legal material. The Court noted that if a person spends a large amount of money to access something, it would be expected that they would, in fact, make use of it.

In addition, since such material is usually accessed in the secrecy of one’s own home, it is reasonable to believe that it would remain on electronic devices in that home. The Court agreed there was sufficient nexus.

The Court also addressed the specifics of the federal laws cited, and agreed that the warrant was improperly suppressed. The Court reversed the District Court’s decision and remanded the case.

**U.S. v. Castro, 881 F.3d 961 (6<sup>th</sup> Cir. 2018)**

**FACTS:** A series of similar robberies occurred in Dallas, TX, during December, 2014. Police interrupted the last one and arrested a suspect, Olaya. In the process of a search of the car, they located a cell phone, and obtained a warrant to search it. An officer “reviewed the contents of the phone by hand.” He took screen shots of potentially incriminating evidence, and then placed

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<sup>45</sup> U.S. v. Wagers, 452 F.3d 534 (6<sup>th</sup> Cir. 2006).

the phone in storage. The case became merged with a federal investigation and the FBI took charge of the phone, searching it again based on the original warrant.

Officers linked Castro as the organizer of the robberies. They traced a signal from a stolen cell phone to Castro's residence. They watched the house, searched it twice, and also searched her phone briefly on consent. They obtained a search warrant for Castro's two phones, finding incriminating evidence. The two warrants were essentially identical, only differentiated by the individual phone sought.

Both Olaya and Castro were charged under RICO and moved to suppress the cell phone searches. The trial court granted those motions and the prosecution appealed.

**ISSUE:** Must the phrase "evidence of a crime" contained within a search warrant affidavit be read in a commonsense way?

**HOLDING:** Yes

**DISCUSSION:** Castro argued that the particularly requirement was "flubbed" because it authorized a search of the phones for evidence of any crime, not just the robberies. The Court noted that authorizing a single crime, using "the" rather than "a" – would have carried its own problem – as there were multiple armed robberies involved. Further, reading the affidavit in its entirety made it clear that the warrants were focused on the robberies, and that language served as a "global modifier" to limit the search.

The Court looked to Andresen v. Maryland, as well, which indicated that the word crime could not be read in isolation, and that it should be read in a "commonsense contextual" way.<sup>46</sup> Although the last line was overreaching – and tacked on at the end, it did not invalidate the entire warrant. If necessary, any improper evidence seized, of which there was apparently none, could have simply been suppressed.

The Court also addressed the later search using the initial warrant. The Court noted that the federal officers were looking for evidence of the same underlying crime. Further, he never regained custody of the phone, so an additional search of the phone had no effect on his day to day activities, as it didn't cause a second deprivation.

The Court reversed the suppression rulings.

### **U.S. v. Hines, 885 F.3d 919 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On December 15, 2015, Det. Evans (Louisville Metro PD) requested an affidavit to search a residence. The home was owned by Hines' mother, and in it, a CI had seen heroin. Another CI had been involved in drug trafficking from the home. He indicated he was always

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<sup>46</sup> 427 U.S. 463 (1976)

asked to meet Hines at that home. During a meet with the second CI, Hines left that address and proceed in an erratic way to the meeting site, driving in a way intended to evade a possible tail. Hines had been on the local DEA radar for many years and he had been connected to “kilogram quantity” transactions.

The officers obtained the warrant and executed it that same day. They seized several pounds of heroin and cocaine and a large quantity of cash. He was charged and argued for suppression.

The trial court upheld the suppression, find that the two CIs were not sufficiently proven in the warrant to be reliable, as the only information provided was conclusory. Further, because the officer that obtained it was the same one that executed it. The government appealed.

**ISSUE:** If an affidavit includes the basis of knowledge for an unnamed informant’s information, is that sufficient?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that while the affidavit did not name the informants or offer that they’d previously provided reliable information, it did describe the basis of knowledge for both. The Court noted that it did not “evaluate an informant’s veracity, reliability, and basis of knowledge independently; more of one compensates for less of the others.”<sup>47</sup> The court noted that was enough, but also addressed the corroboration, and the surveillance, performed. The Court noted that Hines did go to the meet site as described and that supported the rest of the CI’s story, that the meet was to discuss a heroin shipment. Such specific nonobvious information was highly relevant in assessing a tip.

The Court agreed there was a specific, concrete nexus to support the warrant. With respect to the good faith argument, the Court agreed, the fact that it was the same officer, was immaterial. The warrant was neither bare-bones or conclusory.

The Court reversed the grant of the suppression motion.

**Greer v. City of Highland Park, 884 F.3d 310 (6th Cir. 2018)**

**FACTS:** On October 29, 2014, the Greers lived in West Bloomfield Township, Michigan. At about 4 a.m., SWAT officers blew open the door with a shotgun, but did not knock and announce. The Greers and their three daughters were held at gunpoint on the kneels, and their nephew, Lawrence, who was pending the night, was handcuffed. They were denied an opportunity to see a search warrant. The officers were looking for a “dangerous Russian” who had lived in the home more than a year before. Nothing was found. When they complained, the underlying search warrant was produced.

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<sup>47</sup> U.S. v. Ferguson, 252 F.App’x 714 (6<sup>th</sup> Cir. 2007).

The Greers filed suit, arguing that the search warrant was invalid and/or that the warrant was improperly executed. The officers moved for qualified immunity and were denied. The officers appealed.

**ISSUE:** Is knock and announce the default rule for a search warrant?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that as a rule, search warrants require a knock and announce, and a wait of a reasonable period of time. Although drugs may alter that requirement, it does not justify total abandonment of the rule. Further, at night, the length of time must be lengthened. The Court agreed the execution was totally improper and further, that the warrant should have been promptly produced.

Further, the officers argued that the Greers were required to specify what each officer did during the process, which they were unable to do because the officers work masks and refused to provide names. The court agreed that was also improper and upheld the Greers.

Finally, the Court agreed that the Greers were entitled to a knock and announce, and to view the warrant, and the failure was unconstitutional. The Court upheld the denial of qualified immunity.

**Harris v. Klare, 902 F.3d 630 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On May 22, 2014, seventeen-year-old Harris, her parents and her sister, went to dinner at TGI Friday's. On the way home, the family's minivan was stopped by an Erlanger PD officer. Harris's mother was ultimately arrested for "obstructing a license plate, driving with no registration plates, driving with a suspended license, and possession of a forged instrument." The record was unclear as to the disposition of any charges. Due to items seen in the vehicle, officers believed drug trafficking was going on and called for a drug dog. After a long wait, the dog found no drugs. During the wait, Klare needed to use the restroom and she was escorted there by Officer Klare. With her father's permission, the officer searched Harris first stating the search was necessary. Officer Klare allegedly pinched the Harris's breasts, causing bruising. (The officer indicated she'd previously found contraband in a bra.) It was also alleged that the officer had her weapon unsnapped and she put her hands on the weapon multiple times.

Harris filed a 1983 lawsuit. The district court ruled that there was sufficient reasonable suspicion to believe that there might be drug evidence in the vehicle, which allowed the prolongation of the search. Additionally, Harris consented to the search. Klare appealed.

**ISSUE:** Is a request to use the restroom, conditioned on consent to a search first, a coerced consent?

**HOLDING:** Yes.

**DISCUSSION:** The Court noted that Klare failed to raise the issue of the legality of the initial prolongation and, as such, the extension of the stop was to be treated as valid. The Court noted however, that the “purpose of the initial traffic stop was completed with the arrest of Harris’s mother, the continued seizure of Harris was legal only if the officers had developed a reasonable suspicion of some other criminal activity.” The Court had “serious doubts as to whether the officers reasonably suspected the Harris family of manufacturing or transporting contraband. In fact, the Court agreed that “Klare provides no reason to suppose that Harris’s mother’s alleged traffic violations made it more likely that drug activity was afoot—if anything, one would expect a drug-trafficking family to avoid fastidiously such violations for fear of discovery.”

In addition, the possession of common workers’ tools was not “inherently illegal or even suspicious.” And even IF suspicious, the drug dog dispelled reasonable suspicion absent “some reason to question the reliability of the drug dog.” Since Harris indicated she was not escorted to the restroom until after the dog had cleared the vehicle, the Court agreed a “reasonable jury could conclude that the officers did not reasonably suspect drug activity at the time of her search and that therefore she was unlawfully detained, rendering her consent to the search invalid.”

The Court then looked at Klare’s claim of qualified immunity. She argued that she was “unaware that the drug dog search had been completed and disclosed no drugs.” (Note – she was called to the scene by the initial officers as they needed a female officer.) The Court agreed that Klare was close to the vehicle during the process and could have observed the dog search which produced no alert, and would have likely been talking to the other officers as well.

With respect to Harris’s consent, she was a juvenile. She was not told, and likely was unaware, that she could refuse a search, albeit she needed to go to the restroom. Harris claimed to be unaware that she was going to be searched when she was told to “come over here” by Klare, and would likely be construed as a command, as well. There were six vehicles, and officers, at the scene, and Klare’s weapon was unsnapped. Harris was held for over an hour and that negated a great deal of the voluntary nature of the interaction.

Specifically, the Court noted that:

The length of the detention is particularly significant in light of the implicitly conditional nature of Klare’s offer to escort Harris to the restroom. As Klare’s deposition testimony shows, had Harris refused her consent to Klare’s search, she would not have been allowed to go to the restroom. As anyone who has found themselves waiting in line for the cinema restroom at the conclusion of a movie can attest, forcing someone who has been in custody for over an hour to choose between consenting to a search and going to the restroom is one way to “apply pressure” and “intensify[] the coercive tenor of the request for consent.”

The Court noted that Klare was also holding Harris’s hands behind her during the search. In toto, the Court agreed, the consent was not voluntary, specifically stated that “[w]hen a minor,

untutored in her Fourth Amendment rights, seized for over an hour and in the presence of numerous armed police officers, with her arms secured behind her back and facing the choice of consenting to a search or being kept from the restroom, fails to resist that officer's search of her person, a reasonable jury could find that this non-verbal consent was not voluntarily given."

The Court compared the situation to the one in U.S. v. Beauchamp, and agreed that a reasonable jury could find that Klare was not entitled to qualified immunity, and that based on Harris's account, "they could find that Klare unreasonably searched her without her voluntary consent."

The Court reversed the finding of qualified immunity.

**Morgan / Graf v. Fairfield County (Ohio), 903 F.3d 553 (6<sup>th</sup> Cir. 2018).**

**FACTS:** Morgan and Graf owned a home on a large lot; about 300 feet separated it from other homes. It included a second story balcony with no stairs. Visibility into that area was blocked by fencing and trees. Local law enforcement (the SCRAP unit) received anonymous tips that the couple was growing marijuana and cooking methamphetamine and decided to do a knock and talk.

Five members of the SCRAP unit went to the house and, following their standard practice, surrounded the house before knocking on the door. One officer was stationed at each corner of the house, and one approached the front door. The officers around the perimeter were standing approximately five-to-seven feet from the house itself. The officers forming the perimeter could see through a window into the house on at least one side of the building.

Officers outside could see marijuana plants on the balcony. Because Graf had closed the front door (after talking to an officer), the officer demanded Graf open the door, fearing destruction of the evidence. Deputy Campbell entered, seized both Morgan and Graf, and brought them outside to await a warrant. With that, evidence was found and both were charged with state crimes. The court denied suppression motions; Morgan pled guilty and Graf was convicted. On appeal, the denial of the motion was vacated and the convictions reversed. Ohio dropped all charges on remand.

Both Morgan and Graf filed suit under 42 U.S.C. §1983 – claiming violations of the Fourth Amendment. They argued that "forming a perimeter around the house intruded on their curtilage, an area protected by the Fourth Amendment. What is more, the intrusion was not a one-time event—it was the county's policy to do so during every 'knock and talk.'" The Court dismissed their claims and they appealed.

**ISSUE:** Is it proper to enter a back curtilage during a knock and talk?

**HOLDING:** No.

**DISCUSSION:** The Court broke it down into two questions: “did the SCRAP unit search Morgan’s and Graf’s property and, if so, did that search fall under one of the exceptions to the warrant requirement?”

For the first, the Court agreed that yes, it was. Whether a part of one’s property is curtilage generally involves a fact-intensive analysis that considers (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that the area is used, and (4) what the owner has done to protect the area from observation by passersby.<sup>48</sup> But these factors are not to be applied mechanically: they are “useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.” Often that central consideration requires little more than a commonsense analysis because the concept is “familiar enough that it is ‘easily understood from our daily experience.’”<sup>49</sup>

Under that commonsense approach, the area five-to-seven feet from Morgan’s and Graf’s home was within the home’s curtilage. Even when the borders are not clearly marked, it is “easily understood from our daily experience” that an arm’s-length from one’s house is a “classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’” The right to be free of unwarranted search and seizure “would be of little practical value if the State’s agents could stand in a . . . side garden and trawl for evidence with impunity.” And the right to privacy of the home at the very core of the Fourth Amendment “would be significantly diminished” if the police—unable to enter the house—could walk around the house and observe one’s most intimate and private moments through the windows.

But not only were the SCRAP unit members positioned on the sides of the house, they were in the backyard, too. Indeed, the backyard is where they discovered the marijuana plants, creating the injuries alleged by Morgan and Graf. And “the law seems relatively unambiguous that a backyard abutting the home constitutes curtilage and receives constitutional protection.”<sup>50</sup> It agreed that “is true especially when, as here, there are no neighbors behind the house and the backyard is not visible from the road.”

The county mistakenly focuses its application of the Dunn analysis on the backyard balcony itself, arguing that there is no search because the balcony was not part of the curtilage. But even if the county were correct that a backyard, second-story balcony with no outside access was not part of the curtilage, it would make no difference here, because the balcony is not what is at issue. The curtilage that the officers are said to have entered is the area surrounding the house, five-to-seven feet from the residence. Regarding that area, the county argues only two points—first that the immediate perimeter surrounding the house was not part of the curtilage because there was no fence enclosing the rear or perimeter of the house and, second, that area was not part of the curtilage because Morgan and Graf had neighbors. Those arguments are belied,

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<sup>48</sup> U.S. v. Dunn, 480 U.S. 294 (1987).

<sup>49</sup> Jardines, 569 U.S. at 7 (quoting Oliver, 466 U.S. at 182 n.12).

<sup>50</sup> Daughenbaugh, 150 F.3d at 603; see also U.S. v. Jenkins, 124 F.3d 768 (6th Cir. 1997).

however, by Dunn and Jardines and the “relatively unambiguous” conclusion this court came to 20 years ago in Daughenbaugh.

Moving to the second question, the county argued that “forming a perimeter was not unconstitutional because the officers were protecting their own safety. To be sure, officer safety can be an exigency justifying warrantless entry.” However, the information they had about risk was fairly minimal and the argument that drugs and guns go together, was “no more than a general statement of correlation; and generic possibilities of danger cannot overcome the required particularized showing of a risk of immediate harm.” Further, even had they known for sure he had a firearm, that is not an exigent circumstance, either.<sup>51</sup>

The Court continued:

What is more, the county’s position would create an exception that would swallow the rule. It might be safer for the police to enter the curtilage to form a perimeter; it would certainly be easier to stop someone who might flee by establishing some sort of barrier to that flight. Indeed, many (if not most) Fourth Amendment violations would benefit the police in some way: It could be safer for police without a warrant to kick in the door in the middle of the night rather than ring the doorbell during the day, and peering through everyone’s windows might be a more effective way to find out who is cooking methamphetamine (or engaging in any illegal behavior, for that matter). But the Bill of Rights exists to protect people from the power of the government, not to aid the government. Adopting defendants’ position would turn that principle on its head.

The officers argued that they were not there to do a search, but the Court noted that the subjective intent was irrelevant. Further, even though the items were openly in view on the balcony, the “plain-view exception, however, applies only when “the officer did not violate the Fourth Amendment in arriving at the place where the evidence could be plainly viewed.”<sup>52</sup> As explained above, the SCRAP unit discovered the marijuana only after entering Morgan’s and Graf’s constitutionally protected curtilage. The plain-view exception does not apply.”

The Court concluded that the officers’ rights to enter the property were “like any other visitor” and carried the “same limits of that “traditional invitation”: “typically . . . approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *Id.* Certainly, “[a] visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.” Neither can the police. By doing so here, the SCRAP unit violated Morgan’s and Graf’s Fourth Amendment rights.”

Finally, the Court had to look to the law in place at the time, despite more recent cases that have rendered invalidating that law. Jardines and, more recently, Collins made clear that outside of the same implied invitation extended to all guests, if the government wants to enter one’s

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<sup>51</sup> U.S. v. Johnson, 22 F.3d 674, 680 (6th Cir. 1994).

<sup>52</sup> U.S. v. Taylor, 248 F.3d 506, 512 (6th Cir. 2001).

curtilage it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirement.”<sup>53</sup> As such, the Court ruled in favor of the individual officers, although putting on notice that the law has changed since the facts that arose in this case.

The Court then looked to the liability of the government employer. Under “Gregory v. City of Louisville,<sup>54</sup> we concluded that if a challenged policy is facially constitutional, the plaintiff must show that the policy shows a deliberate indifference to constitutional rights.” In this case, “It is uncontested that the county’s policy required officers to enter “*onto the back*” of any property during *every* ‘knock and talk.’ And as acknowledged by the sheriff and members of the SCRAP unit, that policy did not give any leeway for the officers to consider the constitutional limits that they might face. The SCRAP unit did not weigh the characteristics of properties to determine what parts of the properties were curtilage (and thus off limits). The policy gave no weight to the core value of the Fourth Amendment—one’s right to retreat into his or her home “and there be free from unreasonable government intrusion.”<sup>55</sup>). Quite the opposite: the policy commanded that the SCRAP unit ignore those limits. It was not one employee’s interpretation of a policy that caused Morgan’s and Graf’s injuries—the policy was carried out precisely as it was articulated. And so, because the county’s policy itself was the cause of Morgan’s and Graf’s injury, the county should be held liable under Monell.”<sup>56</sup>

The Court allowed the case to go forward.

### **U.S. v. Sweeney, 891 F.3d 232 (6<sup>th</sup> Cir. 2018)**

**FACTS:** After serving some years for child sexual abuse, Sweeney was released from prison. He tracked down his 14-year-old daughter, over whom he’d lost parental rights following his conviction, and who had been adopted. He communicated with her via Facebook and text message. The girl shared this information with her adopted parents, who contacted DHS and his parole officer. Sweeney told his parole officer he had a cell phone, which he’d left at the shelter where he lived. DHS seized the telephone and, pursuant to a warrant, searched the media-storage card. Child pornography was found.

Sweeney was charged and convicted of child pornography and related offenses. He appealed.

**FACTS:** May probation and parole, which has a legitimate reason to search a phone, also share what is found with other agencies?

**HOLDING:** Yes.

**DISCUSSION:** Sweeney argued that the search of the phone violated the Fourth Amendment. The Court noted that the initial search of his belongings was pursuant to the state law that

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<sup>53</sup> Florida v. Jardines, 569 U.S. 1 (2013); Oliver v. U.S., 466 U.S. 170 (1984); Collins v. Virginia, 138 S. Ct. 1663 (2018)

<sup>54</sup> 444 F.3d 725 (6th Cir. 2006),

<sup>55</sup> Collins, 138 S. Ct. at 1670 (quoting Jardines, 569 U.S. at 6).

<sup>56</sup> Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

allowed the warrantless search of a parolee and their residence. However, Sweeney argued that the parole officer was a “stalking horse” to allow DHS officers to evade the Fourth Amendment. Under Griffin v. Wisconsin, the Court noted such warrantless searches must be connected to the needs of the parole authority and not to simply assist in an unrelated investigation.<sup>57</sup>

The Court looked to a more recent case, Samson, in which Courts have “grounded this exception in the lower expectation of privacy enjoyed by probationers, which is weighed against the promotion of legitimate governmental interests to determine whether the search was reasonable under ‘the totality of the circumstances.’”<sup>58</sup> That justification “is not always related to the special needs of the probationary system,” and as such, the “reason for conducting the search need not necessarily be related to those needs either.” Since the government was relying on the Samson doctrine, the issue of whether the agent was a stalking horse does not apply.

Further, the court noted it has explicitly allowed police officers and probation officers to work together and share information, to achieve their objectives.<sup>59</sup> Here, the parole officer had been informed of Sweeney’s actions of trying to obtain explicit pictures of his daughter. This act was a clear violation of his parole. The fact that DHS was also interested in the contents of his phone was immaterial.

The Court held the search was proper and affirmed his convictions.

### **U.S. v. Ward, 2018 WL 1517180 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Jackson, TN, officers served a search warrant on the McKinnie residence. They focused on the room Ward occupied as an intermittent guest, finding a variety of pills totaling over 6,000 and packaging, along with a drug ledger and prepaid cell phones. Items specific to Ward were also found, including receipts, his “framed parole certificate,” and his laptop. The McKinnies denied ownership of any of the items.

Ward was convicted of drug distribution, and appealed.

**ISSUE:** Is someone that is a regular guest constructively responsible for items found in the bedroom they occupy?

**HOLDING:** Yes

**DISCUSSION:** Ward argued that he did not constructively possess the pills in question, but the Court agreed that he had “recent dominion” over the bedroom. Nor was he just a “passing visitor,” although he argued that the McKinnie’s could have moved the drugs into the bedroom to divert suspicion. The court noted that he had the chance to present his theory to the jury, which it “clear rejected,” and that was the proper role of the jury to decide.

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<sup>57</sup> 483 U.S. 868 (1987).

<sup>58</sup> Samson v. California, 547 U.S. 843 (2006).

<sup>59</sup> U.S. v. Martin, 25 F.3d 293 (6<sup>th</sup> Cir. 1994).

The Court upheld his conviction.

**Com. v. Blake, 540 S.W.3d 369 (Ky. 2018)**

**FACTS:** In 2014, Det. Shoemaker (KSP) was investigating a drug operation in Muhlenberg County. He sent a CI, wired with audio and video, on a controlled buy. Officers watched the CI enter, then the target emerge, talk to a subject in a vehicle inside, and go back inside. They learned the driver of that vehicle to be Blake, who was also rumored to be involved. The CI reported he'd gotten two hydromorphone pills from the dealer, who obtained them from Blake.

A second buy was arranged and Sgt Jenkins (Central City PD) was asked to make a traffic stop on Blake, if possible. Jenkins was aware of the investigation. Again the same scenario occurred and Jenkins was alerted to be on the lookout for a reason to stop the car. He was able to stop her for failing to have her license plate illuminated and he asked for consent to search the vehicle. Officers found \$10,000 in cash in her purse and methamphetamine in the glove compartment. Some of the money was that which had been given by the CI earlier.

Blake was charged with Trafficking. She argued that given the timing, with the sun setting at 5:08 and the stop being at 5:16, she was still within the half hour window permitted by the statute. The Commonwealth conceded that point, but argued that Det. Shoemaker had reasonable suspicion and could transfer that knowledge to Sgt. Jenkins to justify the stop. Jenkins, however, acknowledged his reason for the stop was the license plate violation. The Court supported the stop based on the Collective Knowledge Doctrine and denied the motion to suppress.

She appealed and the Court of Appeals reversed, noting that since Sgt. Jenkins did not actually rely on the information, it could not support the stop. The Commonwealth appealed.

**ISSUE:** May collective knowledge provide justification for a stop?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that collective knowledge can be used to create reasonable suspicion for a stop. The Court noted that despite what Jenkins said, he was acting specifically because of the information shared by Det. Shoemaker. As such, Jenkins had reasonable suspicion and suppression was unnecessary.

The Court reversed the Kentucky Court of Appeals and remanded the case.

**Com. v. Smith, 542 S.W.3d 276 (Ky. 2018)**

**FACTS:** Det. Qualls (Franklin County SO) had been surveilling Smith for some weeks, trying to corroborate tips that he was trafficking in cocaine at a local bar. One night, he followed Smith and observed a brief interaction with a resident of his apartment complex, and then watched him

switch cars. Eventually, Det. Qualls spotted Smith make an unsignaled turn. He did not make the stop, since he was in an unmarked car, but coordinated with Officer Eaton and his K9 to make the stop. Smith denied there was drugs in his car and Eaton ran his drug dog around the car. The dog alerted and Eaton had Smith get out. He found seven grams of cocaine hidden in the car and arrested Smith. Almost \$4300 in cash was in Smith's wallet. Some eight minutes elapsed.

Smith was charged with trafficking and appealed the traffic stop, arguing that Eaton did not see the traffic violation. The trial court agreed that the only valid basis to make a stop was the turn signal violation, and Eaton did not witness that. It agreed that the sniff extended the stop impermissibly. The court suppressed the cocaine and cash.

The Commonwealth appealed the suppression order. The Court of Appeals agreed that the collective knowledge rule permitted Eaton's reliance on Quall's observation, so the stop was justified. However, it agreed the sniff improperly extended the scope of the stop. The Commonwealth sought discretionary review.

**ISSUE:** May collective knowledge provide justification for a stop?

**HOLDING:** Yes

**DISCUSSION:** The Court upheld the collective knowledge doctrine in making the stop.<sup>60</sup> It agreed that an "arresting officer is entitled to act on the strength of the knowledge communicated from a fellow officer and he may assume its reliability provided he is not otherwise aware of circumstances sufficient to materially impeach the information received." However, it acknowledged that even a valid traffic stop, if unduly prolonged, can become unlawful. Eaton "did none of the routine matters associated with a traffic stop, including the issuance of a citation, while he conducted the sniff search." Although he was still acting within an expected time frame for such activities, he "conducted the sniff search *instead* of conducting the usual procedures incidental to a routine traffic stop." He "seemingly abandoned the legitimate purpose of issuing a traffic citation" as he immediately launched into asking about drugs and implementing a dog sniff. Normally, the court would look at extending the stop, but in this case, the legitimate purpose for the stop never got started. He "did nothing to advance" the mission of a traffic stop.

The Court also addressed the Commonwealth's argument the two had a reasonable suspicion there were drugs in the car and the Court agreed that was the case here. However, on the day in question, they had nothing beyond Quall's observations and Smith's prior record, and that was not enough. (His nervousness during the stop was immaterial, as well, as that occurred after the stop, of course.) The Court noted that since his parole status was not raised early enough in the proceedings, it could not be used to justify the stop either.

The Court upheld the suppression.

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<sup>60</sup> See Lamb v. Com., 510 S.W.3d 316 (Ky. 2017).

## **Traft v. Com., 539 S.W.3d 647 (Ky. 2018)**

**FACTS:** On the day in question, Traft and Deputy Schepis (Boone County SO) passed each other during the early morning hours. Deputy Schepis was driving a cruiser equipped with the equipment to read license plates and provide information as to the vehicle and registered owner. He quickly learned that Traft, the registered owner, had an active warrant. Schepis followed and made a traffic stop solely on the license plate reader information.

Once he had the vehicle stopped, Deputy Schepis determined that Traft was intoxicated. He was arrested for DUI and for the outstanding warrant. At trial, Traft moved to suppress the traffic stop, arguing that his right to privacy was violated. When that was denied, he took a conditional guilty plea and appealed. Both the Boone Circuit Court and the Kentucky Court of Appeals affirmed. He then appealed to the Kentucky Supreme Court.

**ISSUE:** May an officer make a traffic stop when a license plate reader indicates that the registered owner of the vehicle has a warrant?

**HOLDING:** Yes

**DISCUSSION:** Traft argued that the reading of his license plate, in full view of the public, violated the Fourth Amendment. The Court noted that Traft could have no reasonable expectation of privacy in the license plate, “either subjectively or objectively.” It was on the exterior of his car, while driving on a public street. As quoted in U.S. v. Ellison<sup>61</sup>:

No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, ' is to provide identifying information 'to law enforcement officials and others. The reasoning in [New York v.] Class,<sup>62</sup> vis-a-vis Vehicle Identification Numbers applies with equal force to license plates: "[B]ecause of the important role played by the [license plate] in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the [license plate] is placed in plain view," a motorist can have no reasonable expectation of privacy in the information contained on it.

Further, the information that the deputy accessed through his reader was public record, information that any member of the general public could obtain, and in fact, was an order directed to peace officers to take him into custody. As such, it “defies logic” that officers should be prohibited from having it. He would have gotten the same information had he asked dispatch to run the plate, and the “mere use of the technology” makes no difference.

The Court assessed Traft’s argument that the deputy took no steps to confirm who was driving before he made the stop. The Court agreed that the appropriate standard was “whether Schepis

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<sup>61</sup> 462 F.3d 557 (6<sup>th</sup> Cir. 2006).

<sup>62</sup> 475 U.S. 106 (1986).

had an articulable and reasonable suspicion (not probable cause) when he pulled Traft over." Although he did not know who was driving, the Court held "that the fact that the owner of the vehicle was subject to seizure for violation of law creates an articulable and reasonable suspicion for an officer to initiate a traffic stop. This was not a case of a "snooping deputy" harassing a law-abiding citizen, as Traft argues. Rather, it was a case of an officer carrying out his sworn duty and abiding by the terms of a warrant issued by a court of this Commonwealth."

The Court affirmed the District Court's denial of the suppression motion and upheld Traft's guilty plea.

**Shively v. Com., 542 S.W.3d 255 (Ky. 2018)**

**FACTS:** Shively was charged with an Attempt - Murder and other charges as a result of a shooting in Louisville. The victim identified him from a photo array, and was familiar with him from contact prior to the shooting. He was arrested several weeks later and waived his right to remain silent, giving a statement. He was convicted and appealed.

**ISSUE:** Is simply talking to a suspect interrogation?

**HOLDING:** No

**DISCUSSION:** Shively argued that his statement was induced, coerced and involuntary. When interviewed, he asked to talk to a particular officer, and provided that officer with unrelated information. They discussed the crime and the officer told him that he was putting his family at risk by his actions, and that there was a "hit" out on him. He was given Miranda by the investigator and he provided a lengthy statement.

The Court agreed the first interaction was not an interrogation, and that in fact, the officer only told him to be honest and assured him that they were trying to protect his family. He made no incriminating responses to that officer. He continued to deny having any direct involvement with the shooting at bar. The Court agreed that the initial interaction was not coercive and upheld the denial of the suppression of the later interrogation.

Shively also moved for a mistrial. Specifically, Reccius testified that Appellant told her he was not the perpetrator, but that he had seen two people walking across the field in question when he was at his mother's house on the day of the shooting. The Commonwealth asked Reccius "What else did [Shively] say about seeing those two individuals?" Reccius responded: I think at one point in the conversation, it was two individuals that turned into three. Umm. I do remember him saying something about he heard two shots. And that at one point in the conversation, I believe he told one detective that was in the interview with me that he didn't see good far away. So, I was getting mixed signals on-I mean, clearly he was trying to hide something from me.

The Commonwealth argued that Reccius's comments were made in the context of her explanation of why she had conducted her investigation in a particular way and why she had moved from one subject to another in questioning Appellant. The trial court denied Appellant's motion for a mistrial and his request for the jury to be admonished that a witness cannot "give an opinion about whether someone is being truthful or not."

We have held, "it is generally improper for a witness to characterize the testimony of another witness as 'lying' or otherwise."<sup>63</sup> In Moss v. Commonwealth, this Court quoted a decision from a sister state in reaching our holding: "A witness's opinion about the truth of the testimony of another witness is not permitted. Neither expert nor lay witnesses may testify that another witness or a defendant is lying or faking. That determination is within the exclusive province of the jury."<sup>64</sup> Here, the trial court stated that Reccius's comment that she was getting conflicting information from Appellant was not tantamount to saying Appellant was lying during the interrogation. We note that "hiding something" and "sending mixed signals" are not necessarily an indication that someone is "lying." A person can "hide something" by omission or by avoiding the subject in controversy. While Reccius's testimony may have indicated that Appellant was hiding things during the interrogation, she testified neither that "people who hide things are often lying," nor that she "thought Appellant was lying because he was hiding things from her." She was testifying in the context of her investigation about her investigatory techniques and why her questions shifted. Simply put, she did not characterize Appellant's statements as lies or opine that he was lying. She also never gave an opinion, either, as to whether he was guilty or innocent in the shooting.

The Court noted that Ordway v. Commonwealth, in which it held: "the determination of an individual's guilt or innocence must be based upon the evidence of the particular act in question; it cannot be extrapolated from an opinion, that his behavior after the event comports with some standardized perception of how the 'typical' suspect behaves."<sup>65</sup> Again, this simply inapplicable to the case at bar. Here, based upon Reccius's interview with Shively, the detective testified that she was getting mixed signals and that Shively was trying to hide something. She did not testify that Shively behaved in a way that guilty people usually behave. Rather, she testified as to the manner in which Shively's story changed and her belief that he was hiding something from her based upon those changes. She linked his behavior neither to his guilt, nor to the behavior typical of guilty parties.

Further, her testimony was made in the context of "explaining her investigatory techniques and why she shifted her questioning of [Shively] from one subject to another during the interview. She made no comment on her opinion as to [Shively's] guilt or innocence during the course of her testimony."

The Court affirmed his convictions.

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<sup>63</sup> Lanham v. Com., 171 S.W.3d 14 (Ky. 2005)

<sup>64</sup> 949 S.W.2d 579 (Ky. 1997) (quoting State v. James, 557 A.2d 471 (R.I.1989)).

<sup>65</sup> 391 S.W.3d 762 (Ky. 2013)

### **White v. Com., 2018 WL 4682487 (Ky. App. 2018)**

**FACTS:** On September 23, 2015, White had sex with an intoxicated woman in a hotel hallway in Louisville. That led to an investigation by LMPD, which identified White as a suspect. Detectives sought out White for questioning, and found him sitting in a van at his home, smoking marijuana. White identified himself with his brother's name. Det. Benton told White she was not interested in the drug use but was there on another matter. White gave his correct name. He agreed to be questioned and for the conversation to be recorded. He admitted the sexual encounter and was ultimately arrested. Both officers were in plainclothes with weapons concealed.

White was indicted for rape, for having sex with a physically helpless person. He moved to suppress, arguing he had not been given Miranda, which was accurate. The Court denied the motion, finding he was not in custody. He entered a conditional plea to Rape 2<sup>nd</sup> and appealed.

**ISSUE:** Is being interviewed in one's own vehicle custodial?

**HOLDING:** No.

**DISCUSSION:** The Court agreed that the circumstances clearly indicated that he was not in custody. Relevant factors in such a determination "include the following: the threatening display of several officers, the display of a weapon by an officer, use of threatening language or tone of voice, place of the questioning, length of questioning, whether the suspect was informed the questioning was voluntary and they were free to leave, and whether the suspect initiated contact with the police or voluntarily admitted the police into their residence to answer questions."<sup>66</sup>

Under the circumstances of the case, the Court held that White did not need to be advised of his Miranda rights, and affirmed his conviction.

### **Lanham v. Elliott, 540 S.W.3d 353 (Ky. 2018)**

**FACTS:** In 2012, Sheriff Elliott (Boyle County) terminated Lanham from his position as a deputy sheriff for alleged misconduct. The following year, Lanham filed suit, arguing that since the Sheriff did not follow the dictates of KRS 15.520 (the Police Officers' Bill of Rights) by providing a hearing and failing to advise him of his rights prior to questioning, Sheriff Elliott violated Lanham's due process rights. Sheriff Elliott responded that KRS 15.520 did not apply to the office and, because Boyle County lacked a merit board, deputies served at the will of the Sheriff. (He also argued that Lanham's claim was that he was, in part, terminated for hiring an attorney was without merit as "no public policy in Kentucky recognized a general legal right to obtain counsel in anticipation of civil proceedings. Lanham later also made a claim of age discrimination.)

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<sup>66</sup> Smith v. Com., 312 S.W. 3d 353 (Ky. 2010).

The trial court ruled for Sheriff Elliott, under summary judgment, finding that KRS 15.520 did not apply to the sheriff's office. Lanham sought review before the Kentucky Court of Appeals. The appellate court addressed Lanham's argument that because KRS 15.420 provides definitions for the Kentucky Law Enforcement Foundation Program (KLEFP) funding which includes deputy sheriffs under the definition of "police officer," that sheriff's offices are included as "local units of government," and that KRS 15.520 applies to such agencies, Lanham was thus covered by the statute. Lanham further argued that the merit board argument was "simply inconsequential" to KRS 15.520.

The Court noted that the primary dispute in the case is the "proper interpretation and application of KRS 15.520 and KRS 70.030 (which indicates that deputies are at-will employees of the sheriff, if not protected by a merit board.) It noted that in 1998, when sheriff's offices were made eligible for KLEFP, KRS 70.030 was amended to provide that the office could request the funding, but was not required to establish a merit board.

The Court of Appeals noted:

Taken separately, the provisions of KRS 15.520(4) and KRS 70.030(1) and (5) appear plain and straight forward. The ambiguity only arises when juxtaposing the two statutes. In KRS 70.030(1), the sheriff's authority to hire and terminate deputies is only circumscribed if a deputy sheriff merit board has been adopted in that county; whereas, KRS 15.520(4) mandates application of its due process procedures if the sheriff elects to receive funding from KLEFP.

And, KRS 70.030(5) allows the sheriff to receive KLEFP funding without establishing a deputy sheriff merit board.

The resolve the conflict, the Court of Appeals looked at Pearce v. Univ. of Louisville<sup>67</sup> in which the Kentucky Supreme Court had held that KRS 15.520 should be accorded to have a "broad and expansive reach," and that the "the entire tone and tenor of KRS 15.520 suggests *uniformity* of due process protections to police officers all across the Commonwealth, irrespective of the urban or rural nature of the local community."

The Court of Appeals conclude that it interprets "KRS 15.520 as mandating that a sheriff is bound by the due process procedures therein if the sheriff has elected to receive KLEFP funding. Simply stated, KRS 15.520 is triggered by the sheriff's acceptance of KLEFP funds." The Court of Appeals agreed that the establishment, or lack of, a deputy sheriff merit board was immaterial.

The Court of Appeals placed no merit on the unlawful termination claim, finding no statutory right violated, and also dismissed several other claims on procedural grounds. The Kentucky Court of Appeals reversed the summary judgement as to the application of KRS 15.520 and the Sheriff appealed to the Kentucky Supreme Court.

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<sup>67</sup> 448 S.W.3d 746 (Ky. 2014).

**ISSUE:** Do the due process provisions of KRS 15.520 apply to Kentucky deputy sheriffs?

**HOLDING:** No, under the prior version of KRS 15.520. **Yes, under the current version of KRS 15.520.**

**DISCUSSION:** The Court began with a summary of the relevant statutes. KRS 70.030(1) provides that a Sheriff may terminate a deputy at will, except as KRS 70.260-.273 (the merit system provisions) applies. Boyle County, however, did not have a deputy sheriff merit board. Because of the date Lanham was terminated, an earlier version of KRS 15.520 was in effect as opposed to the version that is currently the law.

Under that version, the final provision in that statute applies the Bill of Rights only to “police officers.” However, it does not define “police officer” in any applicable definition. As such, the Supreme Court held that sheriff’s offices and police departments have “traditional differences” and a deputy sheriff is not a police officer under the law.

The Kentucky Supreme Court held that KRS 15.520 does not provide any due process rights to deputy sheriffs, although those in a county with a merit board will have due process rights under that body of law, and reversed the decision of the Kentucky Court of Appeals.

**NOTE:** *For the purposes of a full understanding of this case, the following history of KRS 15.520 and related statutes is provided.*

KRS 15.520 (Police Officers’ Bill of Rights) came into Kentucky law in 1980. It is important to note, for later interpretative purposes, that it was added to the end of KRS 15, which before the addition, ended at KRS 15.510. Unlike the usual language in the KRS, which generally applies definitions to the entire chapter in which it appears, then, as now, KRS 15.420, the definitional provisions state reads as follows: “[a]s used in KRS 15.410 to 15.510, unless the context otherwise requires.” This, by default, excludes the definition from being applied in KRS 15.520. This was, in fact, noted by the Kentucky Supreme Court in its ruling. However, KRS 15.520 was statutorily linked to the prior sections, KRS 15.400-.510, which established the Kentucky Law Enforcement Program Fund in 1972, by its last provision, which applied the rights under KRS 15.520 to police officers participating in the KLEPF. When KRS 15.410 was enacted, however, participation in the fund was limited to full-time officers of “lawfully organized police department[s] of county or city governments.” Participating agencies at that time specifically excluded sheriffs and deputy sheriffs among others, as well.

Only in 1998, when some elected sheriffs (those not already making the maximum Constitutional salary), deputy sheriffs and “state or public university officers” were made eligible for KLEPF were they also added to the definition of “police officer” in KRS 15.410. At the time the Boyle County case arose, and until 2015, the last provision in KRS 15.520 read: “(4) The provisions of this section shall apply only to police officers of local units of government who receive funds pursuant to KRS

15.410 through 15.992.” As the Kentucky Revised Statutes provided no definitions for either “police officers” or “local units of government” at the time that would apply to KRS 15.520.

Since the time of the events in this case, however, KRS 15.520 was dramatically amended, in 2015, to take in consideration court decisions in Pearce and Hill v. City of Washington,<sup>68</sup> specifically. Of note, Pearce involved a university officer, one of the categories of officers who initially was not eligible for KLEPF funding, but was only added in 1998, at the same time deputy sheriffs were added, and who certainly would not, but for the definition, normally be considered to be employed by a “local unit of government.” However, the Court accepted that Pearce, as a university police officer, was entitled to the due process provided in KRS 15.520, although the crux of the case involved a different issue.

In addition, rather than eligibility under the statute being a substantive provision now, the meaning of “officer” in KRS 15.520 is now part of the definitions at the beginning of the actual statute. KRS 15.520 currently provides that “[O]fficer” means a person employed as a full-time peace officer by a unit of government that receives funds under KRS 15.410 to 15.510 who has completed any officially established initial probationary period of employment lasting no longer than twelve (12) months not including, unless otherwise specified by the employing agency, any time the officer was employed and completing the basic training required by KRS 15.404.” This also made a slight, but crucial change, with the word “local” and “police” being removed in KRS 15.520, although it remains as part of the definition in KRS 15.420. Under the general rules of statutory construction, if the law used two different words or phrases, it intends to convey two different meanings, and if a word or phrase is undefined, the general “dictionary meaning” of the word or phrase controls. As such, arguably, “local unit of government” and “unit of government” mean different things.

On a related note, prior case law often conflated Kentucky merit law protections for deputy sheriffs, under KRS 70.030, with protections under 15.520, and requiring that in order to have any protections under the latter, a county must have enacted the former, and without that, deputies remain at will employees. (See Vincent v. Doolin<sup>69</sup> and Robinette v. Pike County Sheriff’s Department,<sup>70</sup> among others.) Merit system agencies do, in fact, provide greater and / or more detailed protections, of course.

Furthermore, Sheriffs must also be aware of the provisions of federal law that prohibit terminations based on “politics.” Under Elrod v. Burns, 427 U.S. 347 (1976), the Court provided that “patronage dismissals, or the practice of discharging employees because they in some fashion support a political party other than the one supported by their employers, violates the First and Fourteenth Amendments to the U.S. Constitution.”<sup>71</sup> However, appellate courts agree that is not a hard and fast rule, and that employees who are classified as “confidential” – who hold policymaking positions such as the Chief Deputy – are not protected by the Elrod rule. In

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<sup>68</sup> Same cite as Pearce.

<sup>69</sup> 2005 WL 928649 (Ky. App. 2003).

<sup>70</sup> 2006 WL 2328621 (Ky. App. 2006).

<sup>71</sup> 427 U.S. 347 (1976),

Heggen v. Lee, the incoming Sheriff had declined to retain three deputies when he took office, all of whom had supported his opponent, the prior Sheriff, in the primary election. (Heggen defeated the incumbent at that time and was unopposed in the general election.) The three deputies filed suit under 42 U.S.C. §1983, arguing that their termination was unlawful. Lee argued that he had valid reasons to decline to rehire the deputies, but in fact, many of the purported reasons came to light long after the termination. The District Court ruled against the Sheriff, who appealed. Ultimately, the Sixth Circuit agreed that a deputy sheriff who was not in a policymaking position was protected by Elrod, Branti v. Finkel<sup>72</sup> and / Hall v. Tollett,<sup>73</sup> and the case was returned to the lower court for further proceedings and evaluation. (Ultimately, the case was settled in favor of the deputy sheriffs.)

In conclusion, although the Kentucky Supreme Court ruled against Deputy Lanham in this case, the entire statutory landscape with respect to deputy sheriffs has changed, and terminations that occur now will be considered under the current version of KRS 15.520.

### **Hutchinson v. City of Independence, 2018 WL 297270 (Ky. App. 2018)**

**FACTS:** While off duty, on May 9, 2014, Hutchinson, an Independence police officer, shoplifted an item from a local gun store. He later returned and claimed he'd purchased it several weeks before and asked for a refund. Upon checking and disproving that claim, the store reported it to the Florence PD, which reported it to the Independence PD.

Chief Butler ordered Hutchinson to come to the police station "ready for duty." When he arrived, the officer discovered his access code had been disabled. He was met by officers, searched, disarmed and escorted in to the chief's office. He was informed of the investigation by the Chief and cautioned about making any statement, and duly suspended. He was given a prepared retirement letter, and told to "sign this if you want to protect your retirement." He understood that to mean that if he was fired, he might lose the city's contributions and he immediately signed the letter.

Nothing further was done regarding the theft and no disciplinary proceedings ensued. On June 3, he attempted to rescind his resignation and denied a hearing pursuant to KRS 15.520. On June 4, he was charged with two misdemeanor counts regarding the theft which he resolved it by paying a fine and entering a diversion program.

On March 6, 2015, he filed suit, arguing his resignation had been given under duress. The City filed for summary judgement, which was duly granted in 2016. Hutchinson appealed.

**ISSUE:** Is telling an officer their job is in jeopardy due to misconduct coercion?

**HOLDING:** No

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<sup>72</sup> 445 U.S. 507 (1980).

<sup>73</sup> 128 F.3d 418 (6<sup>th</sup> Cir. 1997).

**DISCUSSION:** Hutchinson argued that his “resignation was unfairly coerced when he was called to Chief Butler’s office.” The Court agreed that suggesting that his position was in jeopardy did not constitute coercion when he had been caught on camera stealing was not coercion. He was properly called in before 24 hours had elapsed and resigned and as such, was not yet legally entitled to a written explanation for his suspension.

The Court upheld the summary judgment.

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